COMMENTS ON HB 5002 (2011)
(RE: MICHIGAN'S WORKERS DISABILITY COMPENSATION ACT)
TO HOUSE COMMERCE COMMITTEE
OCTOBER 4, 2011

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INTRODUCTION

John Braden is one of the foremost experts on Workers Compensation in Michigan. He has been practicing workers compensation law since 1984 as an appellate attorney and briefwriter. He has been involved in many landmark workers compensation cases, directly or as amicus curiae. He has also presented at various meetings of workers compensation lawyers, including the magistrate's school, the Workers Compensation Law Section of the State Bar of Michigan, and the Workers Compensation Section of the Grand Rapids Bar Association.

WORKERS COMP IN A NUTSHELL

Before the Workers Compensation Act, work-related injuries were a lottery. A few workers recovered large damages from their employers for pain and suffering, while the mass of workers injured on the job got nothing (due to defenses like contributory negligence and assumption of the risk) and often ended up on the public dole.

This was unfair to the injured worker and unfair to the taxpayers (who were forced to shoulder a burden cast upon them by unsafe workplaces). So, in 1912, Michigan's Legislature passed a law which currently abolishes lawsuits against employers for pain and suffering. In exchange for such immunity, employers must pay certain economic benefits to injured workers regardless of fault.

Current workers compensation benefits include

- *medical* benefits (unlimited as to time),
- *wage-loss* benefits (typically 80% of the after-tax wage the injured worker was earning at the time of the injury),
- *specific loss* benefits (so many weeks for loss of body parts),
- *total and permanent* (T&P) disability benefits (for catastrophic injuries) and
- *survivor* benefits (payable to a deceased worker's dependents for 500 weeks).

The benefits are subject to caps. They are also reduced by certain other benefits (such as post-injury wages, social security, pensions and unemployment compensation).

No *wage-loss* benefits are payable unless the worker suffers a) wage loss and b) a work-related loss of earning capacity. Wage-loss benefits may also be suspended for specified misconduct by the employee (such as refusing an offer of reasonable employment).

301(1): DEFINITION OF INJURY (page 2 of the Bill, lines 1-4)

Nothing in the current Act[1] nor controlling[2] case law requires pathologic aggravation, and for good reason: eliminating liability for symptomatic aggravation would make many injured, disabled workers wards of the public.

Take the common case of a worker whose work causes disabling back pain, after which the worker is discovered to have a bulged disc. Since there are never pre-injury diagnostic tests for comparison (such tests not being administered to an asymptomatic person), proving that the work caused the pathology can be problematic. Requiring pathologic aggravation would not only deny such workers wage-loss benefits (despite their inability to work), but also deny authorization to pay for the surgery that could get such workers back to work.

301(2): MENTAL DISABILITY (page 2, lines 21-25)

Greater mental stress than what all employees experience is an overly complex way of requiring *unusual* stress. The argument that unusual stress is required was rejected back in 1966,[3] and with good reason.

Take, for instance, a case where a corrections officer develops disabling phobias after years of receiving verbal abuse and having physical altercations with inmates. Under HB 5002, the officer would get no benefits (neither wage loss nor the cost of psychological treatment) because all corrections officers are exposed to such abuse.

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1 The Act uses the word "injury" which is defined by dictionaries as including hurt, which includes infliction of pain.

2 Some cases contain ambiguous statements that symptomatic aggravation is not compensable, but dictum is not authoritative. Indeed, if there were controlling authority, this amendment would not have been sought.

3 *Zaremba v Chrysler Corp,* 377 Mich 226, 231.

Note also the catch-22 created by HB 5002: If the stress is *usual*, the proposed unusual stress requirement would eliminate liability; but if the stress is *unusual*, it would not be "characteristic" of the business, and so would not be a compensable "occupational disease" as defined in new 301(1).

The most stressful jobs are those undertaken by people who do essential work which most of us can't or won't do: policemen, firefighters, corrections officers, school teachers. Is it too much to ask that they be compensated when the stress inherent in their jobs disables them?

301(4)(A): DISABILITY DEFINED (page 3, lines 13-18)

Before *Sington v Chrysler Corp,* 467 Mich 144 (2002), disability was uncomplicated: the worker only had to show that the injury precluded one job. By contrast, HB 5002 would codify *Sington*'s definition of disability, which has proven unworkable in practice:

a) Since only vocational experts can testify to jobs beyond those the worker has handled, the proposal in effect requires both parties to *hire vocational experts in every case*. That adds a good $1000 to the cost of every workers compensation case.

b) Since only God knows about *all* jobs that are available, HB 5002 imposes an impossible burden. Recognizing the impossibility of doing so, not even *Sington* requires offering evidence on *all* jobs, instead allowing unsuitability of all jobs to be inferred from unsuitability of *some* jobs. However, the cases have been unable to clarify *how far afield* the worker must go to prove disability: is applying for ten jobs enough? Fifty jobs? Consequently, neither the worker nor the employer knows whether, on given facts, disability exists; which in turn means that, instead of settling, employers and workers often have to waste money litigating disability.

301(5) and (6): INJURY-CAUSING-WAGE-LOSS REQUIREMENT (page 4, lines 4-5, 12-13)

Under the current Act, only *specified* post-injury events affect wage-loss benefits: getting a job, refusing a work offer. By contrast, HB 5002's denial of comp whenever a noninjury cause concurs[4] would make an *indeterminate host* of events affect compensation: the previous employer going out of business; the end of a work season; layoffs at the previous employer; changes in hours, pay and requirements in

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[4] A requirement that was rejected in *Kurz v Mich Wheel Corp,* 236 Mich App 508 (1999).

the job the worker previously did; new maladies suffered by the injured worker, etc. etc. Since these events can occur at any time and at any frequency, comp claims that currently consist of one or two petitions would become endless litigation.

In addition, since most of these post-injury events do not put any income into the injured worker's pocket, reducing benefits based on them ensures that many injured, disabled workers will have to draw on the taxpaying public in order to survive.

301(6): SUBTRACTING POTENTIAL WAGES (page 4, lines 17-19)

The Act currently subtracts *actual* post-injury wages from wage loss benefits, (*Kurz v Mich Wheel Corp, supra*) but subtracts *potential* wages in only one situation: where the worker loses work after at least 100 weeks of post-injury work. WDCA 301(5)(d). HB 5002 would subtract potential wages in every case. Two major problems would be created by this:

a) *Increased litigation and costs thereof.* Any insurance adjuster can value wage-loss benefits by subtracting actual wages. But since no one knows what a worker *could* earn until vocational experts have testified, cases that could settle will instead end up being tried in order to determine the amount of the offset.

b) *Throwing workers onto welfare.* Full worker's compensation benefits are meager enough: workers only get 80% of after tax wage loss, and even then are subject to maximum rates. If rates are further reduced by what a worker might earn, but is not actually earning, wage-loss benefits will often be too low to enable the worker to survive. We will see more injured workers running up government deficits by seeking Social Security, food stamps, etc.

301(9)(a): TERMINATION DEFENSE (page 5, lines 3-4)

The Act has never contained a termination defense, and for good reason:

a) If employers are thus rewarded for terminating injured workers, many will trump up excuses to do so.

b) A termination defense adds yet another issue to workers compensation cases which requires a trial to resolve. For example, before *Russell v Whirlpool Corp,* 461 Mich 579 (2000) held that a termination defense was unauthorized, Appellate Commission decisions based on that defense were averaging 23 per year. To put that in perspective, in 2010 the Appellate commission issued 151 opinions total. The State of Michigan had better be prepared to stand the cost of more appellate commissioners and Court of Appeals judges, since more will be needed if this defense is revived.

315(1): EMPLOYER CONTROL OF MEDICAL TREATMENT (page 10, line 10)

HB 5002 would expand the employer's right to control an injured worker's medical care from 10 days to three months. We need not guess at the likely effects of such a change, since there is already a track record of employer-directed care. To take an actual example, a worker who injured his back treated with an industrial clinic hired by the employer. The clinic refused to authorize an MRI, instead sending the worker to physical therapy. When the back got worse, the worker got a referral to an orthopod who did order an MRI, which disclosed a ruptured disc. The worker underwent back surgery, but thanks to having to walk around with a ruptured disc for ten months, remains disabled. Every attorney could tell a similar story: industrial clinics serving the employer rather than the patient by refusing to authorize needed tests and treatments. Employer-directed care means *substandard* care that actually *lengthens* periods of disability in the long run.

315(1): ATTORNEY FEES (page 11, lines 6-9)

By overruling *Petersen v Magna Corp,* 484 Mich 300 (2009), HB 5002 would allow employers to violate their statutory obligations with impunity.[5] Why should workers compensation carriers be less responsible than no-fault carriers (who must pay attorney fees if they unreasonably refuse to pay)?

353: DEPENDENTS (page 16, lines 5-6)

HB 5002 would eliminate conclusive dependency, not only for wives, but also for *resident children* of an employee. It seems cruel to force minor children of an injured worker to go to the expense of litigating their dependency.

801(6): INTEREST (page 32, lines 12-16)

Since any reasonable investor can get more than 1% return on an investment, requiring workers comp insurers to pay only that much effectively rewards insurers who choose to invest the money instead of paying workers compensation benefits they owe.

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5 The maximum $1500 penalty in WDCA 801(2) is a joke, being inapplicable whenever benefits are disputed, and being insufficient to cover the cost of seeking the penalty.

CONCLUSION

Two effects are common to most of HB5002's proposed changes:

1. They would make it harder to obtain benefits and reduce benefits that will be obtained, thus forcing many injured, disabled workers to turn to public welfare to survive. This contradicts the entire premise of workers compensation: that rather than making the taxpayer pay, the costs of on-the-job injuries should be borne by the industry that profited from the worker's labor and whose dangerous workplace caused the problem in the first place. For government, HB 5002 is a deficit-creator and a budget-buster.

2. HB 5002 adds factual issues ("medically distinguishable," "greater mental stresses and tensions," "unable to earn," "earning capacity," "fault of the employee") that will require more trials to resolve.[6] It is a monkey wrench in the works of workers comp. That may seem attractive to employers, until they realize that it is they who will have to pay for the monkey wrench. A more accurate title for HB 5002 would be the "Defense Lawyers' Full Employment Act."

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6 For instance, there are already cases going in opposite directions on what "able to earn" and "earning capacity" mean.